

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

_____)	
)	
UNITED STATES OF AMERICA)	No. 4:13-cv-01954
)	
Plaintiffs,)	(Judge Brann)
)	
v.)	(Filed Electronically)
)	
XTO ENERGY, INC.)	
)	
Defendant.)	
_____)	

MOTION TO ENTER

Plaintiff, the United States of America (“United States”), on behalf of the Environmental Protection Agency (“EPA”), respectfully request this Court enter the proposed Consent Decree in the above-captioned matter. On July 18, 2013 the United States lodged with this Court a proposed Consent Decree (“proposed Decree”) which resolves a claim against XTO Energy, Inc., (“Defendant”) for civil penalties and injunctive relief under the Clean Water Act, 33 U.S.C. §§1251-1387, resulting from the unauthorized discharge of pollutants into waters of the United States. See proposed Decree Docket no. 3, Attachment 1. The Complaint, also filed on July 18, 2013, sought civil penalties and injunctive relief for the discharge of produced fluid from tanks located at Defendant’s well pad and storage facility located at 301 Marquardt Road, in Hughesville, Lycoming County, Pennsylvania. See United States’ Complaint Docket no. 1.

In accordance with 28 C.F.R. § 50.7 and Section XIX of the Consent Decree, notice of the lodging of the proposed Decree was published in the *Federal Register* on July 24, 2013. 78 Fed. Reg. 44599-02 (July 24, 2013). The notice invited the public to comment on the proposed

settlement within a period of thirty days. The United States did not receive any public comments.

The Motion is unopposed. Defendant has assented to entry according to the terms of the proposed Decree. (*See* proposed Decree ¶ 70.)

The proposed Consent Decree is fair, reasonable, and consistent with the purposes of Clean Water Act. A memorandum in support of this motion is filed herewith. The proposed Decree lodged on July 18, 2013 constitutes the proposed order for this motion. Accordingly, the Plaintiff respectfully moves this Court to approve and enter the Consent Decree by signing it at page 33.

Respectfully submitted,

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U.S. Department of Justice

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Dated: August 29, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

That this 29th day of August 2013, she served a copy of the attached

MOTION TO ENTER

by electronic mean to the following email addresses.

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James Van Orden – VanOrden.James@epa.gov
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/s/Christina L. Garber
CHRISTINA L. GARBER
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**PLAINTIFF'S MEMORANDUM IN SUPPORT OF ENTRY
OF THE PROPOSED CONSENT DECREE**

I. PRELIMINARY STATEMENT AND SUMMARY

Plaintiff, the United States of America ("United States"), on behalf of the Environmental Protection Agency ("EPA"), respectfully request this Court enter the proposed Consent Decree in the above-captioned matter. On July 18, 2013 the United States lodged with this Court a proposed consent decree ("proposed Decree") which resolves a claim brought in a Complaint against XTO Energy, Inc., ("Defendant") for civil penalties and injunctive relief under the Clean Water Act, 33 U.S.C. §§1251-1387, resulting from the unauthorized discharge of pollutants into waters of the United States. See Complaint Docket no. 1, proposed Consent Decree, Docket no. 3, Attachment 1. The claim, as alleged in the Complaint, related to discharges of contaminated produced fluid in to waters of the United States from tanks located at Defendant's well pas and storage facility located at 301 Marquardt Road, in Hughesville, Lycoming County, Pennsylvania.

The proposed Decree requires XTO to pay \$100,000 to the United States as a civil penalty and obligates XTO to perform substantial injunctive relief, estimated to cost approximately \$20 million. As injunctive relief, XTO will be required to institute significant tank management practices, such as installation of secondary containment, high level shut-down devices, and caps, flanges and plugs at all existing and new natural gas wells in Region 3. The proposed Consent Decree prohibits XTO from storing any hydraulic fracturing fluid in open top containers or lagoons. XTO must develop and implement a standard operating procedure for tank loading and unloading, and it must conduct training. XTO will submit a work plan, which EPA will comment on, specifically outlining its implementation plan for the injunctive relief. Finally, XTO will be required to use best efforts to recycle flowback fluid and produced fluid in Region 3, and will recycle no less than 50% of its total flowback fluid and produced fluid at all Pennsylvania sites as an annual average. When not recycling, it must dispose of fluids at facilities with a federally-enforceable NPDES permit that are capable of accepting such wastewaters.

In accordance with 28 C.F.R. § 50.7 and Section XIX of the Consent Decree, notice of the lodging of the proposed Decree was published in the *Federal Register* on July 24, 2013. 78 Fed. Reg. 44599-02 (July 24, 2013). The notice invited the public to comment on the proposed settlement within a period of thirty days. The United States did not receive any public comments.

The Motion is unopposed. Defendant consents to entry according to the terms of the proposed Decree. (*See* proposed Decree ¶ 70.)

The Consent Decree is fair, reasonable, and consistent with the purposes of CERCLA. Accordingly, the Plaintiff respectfully moves this Court to approve and enter the Consent Decree by signing it at page 33. The proposed Consent Decree is attachment 1 to Docket no. 3.

II. BACKGROUND

XTO Energy, Inc., owns and operates a well pad and storage facility along Marquardt Road, Hughesville, Lycoming County, Pennsylvania (“the “Site”) where it conducts hydraulic fracturing. Hydraulic fracturing is a process used to release natural gas from the Pennsylvania Marcellus shale formations. It involves injecting liquids into wells at high pressure to cause fractures through which gas and/or oil can flow and ultimately be captured. During this process, contaminated water is generated (“flowback fluid”). In addition, contaminated water is produced during production (“produced fluid”). Flowback fluid and produced fluid contain water, hydraulic fracturing chemicals, and contaminants such as dissolved solids, heavy metals and radionuclides.

At the Site, XTO used a battery of portable tanks to store produced fluid. The tanks each had a capacity of 21,000 gallons, and some were connected internally through a manifold system. XTO’s contractor conducted mobile treatment and recycling of produced fluid at the Site. The complaint alleges that on November 16, 2010, a Pennsylvania Department of Environmental Protection inspector visited the Site and observed produced fluid being released from an open tank valve to the ground and towards a tributary. The state inspector closed the valves, contacted XTO and issued a notice of violation.

The Complaint alleges that due to this release, XTO violated Section 301 of the CWA, 33 U.S.C. § 1311(a), which prohibits the discharge of any pollutants to waters of the United States except in compliance with a permit issued pursuant to Section 402 of the CWA. The produced fluid released from the valve caused an unpermitted “discharge” which is defined as “the addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362 (12). The discharge flowed from the open tank valves which are point source under 33 U.S.C.

§ 1362(14). The Complaint alleges that the produced fluid flowed to an unnamed tributary and Sugar Run, which are waters of the United States under the Clean Water Act, Section 502(7), 33 U.S.C. § 1362(7).

For the alleged violation, XTO is subject to penalties under CWA Section 309, 33 U.S.C. § 1319(d), which allows penalties adjusted to an amount not to exceed \$37,500 per day for violations occurring after January 12, 2009.

The proposed Decree orders Defendant to pay a civil penalty of \$100,000 within 30 days of entry of the decree, and it further orders Defendant to implement the injunctive relief such as described above, and recycle produced fluid to the maximum extent practicable in EPA Region III and no less than 50% over three years in Pennsylvania. In addition, XTO is required to submit bi-annual reports on its progress under the proposed Consent Decree.

III. STANDARD OF REVIEW

The well settled standard for deciding whether to enter a proposed consent decree is whether it is fair, reasonable, and consistent with the purposes that underlying statute is intended to serve. *See United States v. Atlas Minerals and Chemicals, Inc.*, 851 F. Supp. 639, 648 (E.D. Pa. 1994); *see also In Re Tutu Water Wells CERCLA Lit.*, 326 F.3d 201, 210 (3d Cir. 2003); *United States v. Southeastern Pa. Transp. Auth. (ASEPTA@)*, 235 F.3d 817, 823 (3d Cir. 2000).

The scope of a district court's review of a proposed consent decree is limited. While a court "should not blindly accept the terms of a proposed settlement," *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999), and should "eschew any rubber stamp approval in favor of an independent evaluation," *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2nd Cir. 1974), the court's inquiry need not be all-encompassing:

[A] trial court approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy. In fact, it is precisely the desire to avoid a protracted examination of the parties' legal rights that underlies entry of consent decrees.

Bragg v. Robertson, 83 F. Supp.2d 713, 717 (S.D. W.Va. 2000) (citations omitted); *accord United States v. Comunidades Unidas Contra la Contaminacion*, 204 F.3d 275, 281 (1st Cir. 2000); *North Carolina*, 180 F.3d at 581; *Grinnell*, 495 F.2d at 462.

A reviewing court's examination of a consent decree is "highly deferential." *United States v. Atlas Minerals and Chemicals, Inc.*, 851 F. Supp. 639, 648 (E.D. Pa. 1994). "The presumption in favor of settlement is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency specially equipped, trained, or oriented in the field. EPA is such an agency." *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1035 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990). Where the United States is a party to a consent decree, the balance of competing interests affected by a proposed settlement "must be left, in the first instance, to the discretion of the Attorney General." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981), *cert. denied*, 454 U.S. 1083 (1981); *see also United States v. Assoc. Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir. 1976) (The Attorney General retains "considerable discretion in controlling government litigation and in determining what is in the public interest."). The court does not have the power to modify a consent decree; it may only approve or reject it. *Cannons Eng'g Corp.*, 899 F.2d at 103.

In sum, the Court's role in reviewing the proposed Decree is limited. If the consent decree is fair, adequate and reasonable, and not illegal, the product of collusion, or against the public interest, it ought to be approved without modification. *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991). Moreover, in determining whether the proposed Consent Decree ought

to be approved, the Court should defer to the EPA's expertise in protecting human health and the environment and to the Attorney General's expertise in controlling government litigation, assessing litigation risk and determining settlement terms that are in the public interest.

IV. THE PROPOSED CONSENT DECREE IS FAIR, ADEQUATE AND REASONABLE

The United States submits that the proposed Consent Decree is fair, adequate and reasonable because it was negotiated at arm's length and in good faith, the settlement addresses the allegations in the Complaint, and the settlement is consistent with the enforcement goals of the Clean Water Act. The Consent Decree was vetted, examined, and agreed to by the United States and the defendant after careful review.

First, the settlement is fair and is not the product of collusion. The United States and counsel for the Defendant, Defendant's in-house counsel and engineers and representatives from Defendant's operations in the region engaged in settlement discussions prior to the United States' filing the complaint. Through months of arm's length negotiations, the parties had the opportunity to explore each other's positions regarding XTO's Clean Water Act compliance issues and to discuss technical means for XTO to prevent future violations. Negotiations were based on information obtained by EPA and the State of Pennsylvania, including state inspection reports, technical analysis, hydrological reports, interviews with XTO personnel and discussions with counsel. This information was discussed with the defendant during the settlement negotiations.

Second, the proposed Consent Decree is adequate and reasonable because it is designed to penalize XTO for the violations of the Clean Water Act alleged in the complaint and to serve as a deterrent to future conduct by XTO and other potential industry violators. Further, as to the

civil penalty, were the case to proceed to trial, the United States would first need to establish XTO's liability under Sections 301 of the Clean Water Act, 33 U.S.C. § 1311(a). If XTO was found liable, the Court would then consider the following factors in assessing a civil penalty: "the gravity of the violation, the economic benefit or savings (if any), the size of the violators business, the violators history of compliance, actions taken to remedy the violation, the effect of the penalty on the violators ability to continue in business, and any such other matters as justice may require." 33 U.S.C. § 1319(d). The civil penalty reflected in the proposed Consent Decree is fair and reasonable in light of the factors above and considering the risks to both Parties that the Court could, if XTO were found liable, award a penalty either higher or lower than \$100,000. The civil penalties will address past CWA violations, while also deterring future violations. In addition, the settlement is reasonable because it requires a comprehensive injunctive relief program designed to prevent spills of contaminated water from XTO's operations from occurring in the future. XTO is required to implement corrective and preventative measures listed in "Section V. Compliance Requirements" of the proposed Decree. These measures include: (1) requirements for recycling and disposal of flowback fluid and produced fluid (proposed Decree ¶10) and (2) tank management best practices (proposed Decree ¶¶11-13.) These measures will help ensure XTO's compliance with the CWA with all of its operations in EPA Region III and will provide a model for best management practices within the industry.

Third, the settlement is not illegal or against the public interest. On the contrary, as noted above, the proposed Decree achieves the goal of deterrence through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. The settlement comports with the goals of the CWA, which are to eliminate the discharge of pollutants into navigable waters and to provide for water quality sufficient for "the protection and propagation

of fish, shellfish, and wildlife and . . . recreation in and on the water.” 33 U.S.C. § 1251(a) and (b). Finally, the proposed Consent Decree is consistent with the goal of promoting cost-effective settlement practices, which further the public interest, health and safety by preserving the limited resources of the government in its efforts to enforce the Clean Water Act.

V. CONCLUSION AND REQUEST

For the foregoing reasons, the United States represents to the Court that the proposed Decree is fair, adequate and reasonable and consistent with the goals of the Clean Water Act. The United States, therefore, respectfully requests the Court sign the proposed Consent Decree and enter it as the judgment of the Court in this action. There is a space for the signature of the Court on page 33 of the proposed Consent Decree. (*See* Docket No. 3, Attachment 1).

Respectfully submitted,

ROBERT G. DREHER
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

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The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

That this 29th day of August 2013, she served a copy of the attached

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF ENTRY
OF THE PROPOSED CONSENT DECREE**

by electronic mean to the following email addresses.

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/s/Christina L. Garber
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